MADJAI SANUSI

v.

PP

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CRIMINAL APPLICATION NO: 44-6-1998]
8 OCTOBER 1998

CRIMINAL PROCEDURE: *Bail - Refusal of bail in magistrate's court - Subsequent application by way of notice of motion to High Court - Whether should go by way of appeal - Criminal Procedure Code, s. 307(i) - Whether application struck off*

Th applicant's application for bail was refused in the magistrate's court on the grounds of public policy and national interest.

The applicant then applied for bail to this court on the basis that the magistrate had erred in refusing bail. It was deposed that the prosecuting officer did not raise the issues of public security and national interest. Also, that no evidence was produced to show that the applicant posed a danger to public security and that it was in the national interest that bail be refused.

A preliminary objection was raised to the effect that the applicant should not have filed the instant application by way of a notice of motion but by way of an appeal against the decision of the magistrate.

Held:

[1] When the magistrate made an order refusing bail to the applicant, the issue of bail settled the applicant's right to liberty. It was an order within the ambit and purport of s. 307(i) of the Criminal Procedure Code and thus appealable to the High Court.

[2] The granting or refusal of bail under s. 388 CPC is entirely a discretionary domain of the court. The issue of bail would be left in abeyance as it would be decided on appeal.

[Preliminary objection allowed. Application struck off with an option to appeal.]

Case(s) referred to:
Bakshi Sardari Lal v. Supt, Tehar Central Jail [1968] Cr LJ 675 ***(refd)***
Bhramar v. State of Orissa [1981] Cri LJ 1057 ***(refd)***
Datuk Mahinder Singh v. PP [1987] 2 CLJ 39 ***(refd)***
Dato' Mat Shah lwn. PP [1991] 2 MLJ 125 ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 ***(refd)***
Lim Kiap Khee v. PP [1988] 1 MLJ 198 ***(refd)***
Maleb Su v. PP, Cheak Yoke Thong v. PP [1984] 1 MLJ 311 ***(refd)***
Manickam & Ors v. PP [1982] 1 CLJ 162 ***(refd)***
Marzuki Mokhtar v. PP [1981] 2 MLJ 155 ***(refd)***
PP v. Abdul Rahim Haji Ahmad & Ors [1988] 3 MLJ 272 ***(refd)***
PP v. Hoo Chang Chwen [1962] 28 MLJ 284 ***(refd)***
PP v. Manikya Rao AIR [1959] Andra Pradesh 639 ***(refd)***
PP v. RK Menon & Anor [1978] 2 MLJ 152 ***(refd)***
PP v. Zulkifflee Hassan [1990] 2 MLJ 215 ***(refd)***
R v. Lim Kwang Seng & Ors [1956] MLJ 178 ***(refd)***
Ratilall Bhanji Mithani v. Assistant Collector of Customs AIR [1967] SC 1939 ***(refd)***
Sebastian v. PP [1968] 2 MLJ 214 ***(refd)***
State v. Dallu Punja [1954] Cri LJ 1052 ***(refd)***
State of Uttar Pradesh v. Kailash AIR [1955] UP 97 ***(refd)***
Sulaiman Kadir v. PP [1976] 2 MLJ 37 ***(dist)***
Yusof Mohamed v. PP [1995] 3 MLJ 66 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 2(i), 307(i), 387(i), 388(i), 389
Immigration Act 1959, ss. 55D, 56(1), 57
Passport Act 1966, s. 12(1)(f), (2)
Penal Code, ss. 376, 409

For the applicant - Md Zahar Ngah; M/s R R Mahendran & Co
For the respondent - Datin Amelia Tee Hong Geok Abdullah; SDPP

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

By way of a notice of motion in encl. 2 the applicant applied for bail pending hearing of his case and any other relief as this court deemed fit. Enclosure 2 was supported by an affidavit of the applicant himself that was affirmed on 7 July 1998 and marked as encl. 3. There were twelve paragraphs to encl. 3 and basically it revolved on the application of the applicant for bail pending hearing of his case before the magistrate, Magistrate Court, Johor Bahru. Four paragraphs out of the twelve paragraphs in encl. 3 were crucial and they adverted to what the magistrate did and these four paragraphs were worded thus:

> 6. Saya sesungguhnya percaya dan dinasihati oleh peguamcara saya bahawa Majistret Kehormat telah bertanyakan kepada Pegawai Pendakwa dan Jabatan Imigresen mengenai jaminan. Pegawai Pendakwa tersebut telah tidak menawarkan jaminan dengan alasan bahawa tertuduh adalah seorang yang bukan warganegara Malaysia oleh itu tidak layak diberi jaminan.

8. Saya sesungguhnya percaya dan dinasihati oleh peguamcara saya bahawa Majistret Kehormat kemudiannya telah memutuskan untuk tidak memberi jaminan kepada tertuduh atas dasar keselamatan awam dan kepentingan negara.

9. Saya sesungguhnya percaya dan dinasihati oleh peguamcara saya bahawa isu keselamatan awam dan kepentingan negara telah tidak ditimbulkan oleh Pegawai Pendakwa di dalam Mahkamah dan tiada keterangan dibawa oleh Pegawai Pendakwa untuk menunjukkan bahawa pembebasan saya dengan jaminan adalah membahayakan keselamatan negara dan kepentingan awam.

10. Saya sesungguhnya percaya dan dinasihati oleh peguamcara saya bahawa Majistret Kehormat telah membuat kesilapan di sisi undang-undang berkenaan perintah untuk tidak memberi jaminan atas alasan:

    (a) .. (not relevant)

    (b) Majistret Kehormat dalam memutuskan untuk tidak memberi jaminan telah menimbangkan isu keselamatan awam dan kepentingan negara yang tidak pernah ditimbulkan oleh pihak Pendakwa di Mahkamah.

Briefly, it appeared that the magistrate had enquired of the prosecuting officer in regard to the issue of bail. The prosecuting officer replied that the applicant was not a Malaysian citizen and was not entitled to bail. Eventually the magistrate refused to grant bail on the grounds of public security and national interest. It was deposed that the prosecuting officer did not raise the issues of public security and national interest and no evidence was produced by the prosecuting officer to show that the applicant posed a danger to public security and that it was in the national interest that bail be refused. For these reasons, it was deposed that the magistrate had erred in refusing bail.

The director of immigration, Johor Bahru, by the name of Mr. Tasnim bin Othman ('Mr. Tasnim') affirmed an affidavit on 21 September 1998 which was filed on the same date as seen in encl. 14. At para. 4 of encl. 14, Mr. Tasnim deposed that there was every probability that the applicant might abscond because the applicant was only a permanent resident and he was charged with serious offences: two charges under s. 55D of the Immigration Act 1959 (Revised 1997) and punishable under the same section of the same Act; one charge under s. 56(1) of the Immigration Act 1959 (Revised 1997) and punishable under s. 57 of the same Act; and, finally, one charge under s. 12(1)(f) of the Passport Act 1966 (Revised 1996) and punishable under s. 12(2) of the same Act. Mr. Tasnim deposed at para. 5 of encl. 14 that there was a strong probability that the applicant would abscond as his residence at No. 48, Jalan Keris, Taman Putri Wangsa, Ulu Tiram where the applicant lived with his second wife and child, was found to be vacant. The immigration

officers visited the said house on 22 June 1998 and found the said house was empty, not a single dweller in sight. Again, on 25 August 1998, the immigration officers visited the said house and they found the said house was empty, bereft of any dweller. The immigration officers were said to be on the alert to locate the applicant's wife. At para. 6 of encl. 14, Mr. Tasnim deposed in serious vein. He said that the charges levelled against the applicant were serious. There were lots of equipment that were used to forge the documents as set out in the charges and these equipment were seized from the applicant's house. The equipment that were seized were set out in the search list dated 14 June 1998 and the search list was exhibited as exh. 'TBO 2' in encl. 14. Based on the equipment, documents and the items seized, Mr. Tasnim verily believed that national interest and public security would be challenged once the applicant was put on bail. Mr. Tasnim deposed at para. 7 of encl. 14 to the effect that the immigration was still doubtful about the identity of the applicant. It was deposed that the applicant was currently using a passport bearing number G 382234 containing the photograph of the applicant with the name "Saiful" and the date of birth was stated as 18 April 1967. Whereas the red identity card of the applicant bearing number 8481070 with the photograph of the applicant bore the name of the applicant as Madjai bin Sanusi with the date of birth to be 1963 only. These two documents were exhibited as 'TBO 3' and 'TBO 4' of encl. 14. The immigration was in the process of ascertaining the real identity of the applicant and till to date, it was deposed that it would not be prudent to release the applicant on bail. For these reasons, Mr. Tasnim prayed for the application for bail by the applicant to be dismissed by this court.

The applicant responded and his response can be seen in his affidavit that was affirmed on 29 September 1998 and filed on 30 September 1998 as seen in encl. 15. Briefly, the applicant explained that house No. 48, Jalan Keris, Taman Putri Wangsa, Ulu Tiram was a rented house and his second wife had gone back to Indonesia. It was for this reason that the rented house was left vacant. The applicant deposed that his permanent address was at No. 6A, Jalan Mutiara, Kampung Melayu Majidee, Johor Bahru and that he had stayed there for the last nine years. The applicant further deposed that he became a permanent resident since 1983 approximately fifty years ago while his wife became a permanent resident since 1990. It was for these reasons that the applicant deposed that he would not abscond as he had come to Malaysia to earn a living and for a better life than the one he had in Indonesia. In regard to the discovery of the equipment meant to forge documents that were recovered in his rented house, the applicant deposed that that house was rented by him together with his two friends by the name of Omar and Suwito. The applicant said that he rented the front room with his wife and child while the middle room was converted into a store and the room at the rear of the house

was rented by five bachelors. For these reasons, the applicant deposed that he had a good defence. In regard to his passport that bore the name of Saiful, and a different date of birth from that of his identity card, the applicant deposed that there was no criminal action taken against him in regard to these matters. The applicant further deposed that these issues were within the jurisdiction of the Indonesian authorities and the fact that he was not convicted of any offence in Indonesia and the fact that he had been given an Indonesian passport explained the situations further. The applicant deposed that he was willing to abide by the conditions of the bail bond and that he had no prior criminal record. The applicant prayed that he be given bail so that he would be able to look after his first wife and his adopted children who were dependent on him.

Mr. Wan Abdul Aziz bin Wan Mahmood ('Mr. Wan Aziz'), the head of the enforcement division of the immigration department in Johor Bahru, affirmed an affidavit in rebuttal in encl. 18 on 3 October 1998 and filed on the same day. There Mr. Wan Aziz deposed that the immigration officers had visited house No. 6A, Jalan Mutiara, Kampong Melayu Majidee, Johor Bahru and discovered that the applicant's first wife was only renting one of the rooms in the said house. Mr. Wan Aziz too denied that Omar and Suwito rented house No. 48, Jalan Keris, Taman Putri Wangsa, Ulu Tiram and he said that this allegation was untrue and that there was evidence to show that the said house was rented by the applicant. Mr. Wan Aziz deposed that since the permanent resident status and the red identity card that were given to the applicant were based on the applicant's passport, it was unreasonable for a permanent resident to hold a red identity card and passport using different names and different dates of births. All these showed that the applicant was using more than one identity and the real identity of the applicant whether as the applicant by the name of Madjai bin Sanusi or Saiful, was still unknown. The immigration was worried that if the applicant was released on bail, he could use a different identity to abscond and disappear from trace. Mr. Wan Aziz deposed that the immigration was in the process of determining the method whereby the applicant managed to secure a permanent resident status and the document he used to obtain a red identity card. The immigration was reviewing the applicant's permanent resident status with a view to revoke it accordingly. For these reasons, Mr. Wan Aziz prayed that the applicant's application be dismissed forthwith.

The affidavits that have been referred to showed the nefarious activities of the applicant. Had the matter arose across the causeway, the applicant would have been convicted, imprisoned and deported right away. No mercy would be shown to him. Malaysia would be better off without people like the

applicant or his kind. Two immigration top officers deposed affidavits to challenge the applicant's application for bail. Credence must be given to these two immigration personnel.

The learned deputy public prosecutor in the person of Datin Amelia Tee Hong Geok bte Abdullah took exception to the application for bail that was filed by way of a notice of motion in encl. 2. She raised a preliminary objection to the effect that the applicant should not have filed a notice of motion in encl. 2 to obtain bail, instead the applicant should have lodged an appeal against the decision of the magistrate who had refused bail. It was her arguments that the affidavit in support of encl. 2, namely, encl. 3 contained passages referring to what the magistrate had said and what had transpired before the magistrate. Enclosure 3 too contained an allegation that the magistrate had made a mistake. Thus, the best way to resolve the issue of bail would be by way of an appeal so that this court would have the benefit of the notes of evidence as recorded by the magistrate and, I may add, this court too would have the benefit of the grounds of decision of the magistrate.

Was It The Correct Procedure?

There was only one issue to be adjudicated upon. Was the procedure adopted by the applicant in filing a notice of motion in encl. 2 the correct procedure to challenge the decision of the magistrate in refusing bail? Datin Amelia Tee Hong Geok bte Abdullah submitted that it was the wrong procedure and the right procedure would be by way of an appeal. Mr. Md. Zahar bin Ngah, learned counsel for the applicant, submitted that the procedure that was adopted was correct.

Now, in filing encl. 2 the applicant was relying on s. 389 of the Criminal Procedure Code (FMS Cap 6) ('CPC') which reads as follows:

> The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

The difference between the two procedures have been amply set out by Harun J (as he then was) in *Sulaiman Kadir v. PP* [1976] 2 MLJ 37. There his Lordship said:

> The difference between the two procedures is simply this: If it is an appeal, it will take a longer time to be heard because there has to be a Notice of Appeal and the Subordinate Court will have to state its reasons for refusal before the Petition of Appeal can be filed and eventually heard but if it is an application

> by Notice of Motion supported by affidavit, it can be made immediately after refusal without notice to the Subordinate Court (but with Notice to the Public Prosecutor) and the application can even be heard by the High Court on the same day or very soon thereafter, speed being the essence of such an application.

and further down the same page of the same judgment, his Lordship continued:

> There does not appear to be any authority as to which is the proper course to take in such cases. In my view, if a person should not be kept in custody for a moment longer than is necessary then the speedy procedure of section 389 is obviously indicated. But there are other compelling reasons why section 389 is the appropriate procedure. That section gives the High Court absolute discretionary powers to vary bail from time of arrest right up to the time of conviction. It may grant bail when bail has been refused. It may reduce the amount of bail if the amount is excessive. It may increase the amount of bail if the amount is insufficient. But it may not order custody if bail has been granted. The appeal provisions of section 394 of the Criminal Procedure Code, on the other hand, are intended to deal with matters not provided for under section 389 of the Criminal Procedure Code, for instance, if an accused person had been admitted to bail by a Subordinate Court contrary to section 388(i) of the Criminal Procedure Code. As this application arises out of a refusal to grant bail, the provisions of section 389 apply and I accordingly hold that it is properly before this court.

Expediency and speed would be the essence of s. 389 of the CPC. But the facts in *Sulaiman Kadir v. Public Prosecutor (supra)* are poles apart from the present case. The applicant in that case was charged with rape under s. 376 of the Penal Code in the Special Sessions Court at Kuala Lumpur and his application for bail was refused. It was justifiable for the learned president of the Special Sessions Court at Kuala Lumpur to refuse bail since the subordinate court had no power to grant bail "if there are reasonable grounds for believing that an accused person has been guilty of an offence punishable with death or life imprisonment." There were no allegations of public security and national interest being raised in that case unlike the present case currently faced by this court. In the present case too, the affidavits showed what had transpired before the magistrate's court in Johor Bahru and the authenticity of what had transpired before the magistrate can only be verified by the notes of evidence of the magistrate in question.

Gunn Chit Tuan SCJ in *PP v. Zulkifflee Hassan* [1990] 2 MLJ 215 SC, speaking for the then Supreme Court had this to say of s. 389 of the CPC (see p. 217 of the report):

> For a start we considered that it should be borne in mind that s. 389 of the Criminal Procedure Code is concerned with the amount of bond executed by

a person released on bail under Chapter XXXVIII of the said Code. That section specifies that when a man who is arrested is not accused of a non-bailable offence, no needless impediment should be placed in the way of his being admitted to bail. The discretionary power of the court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. It is established that the courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances, the character, means and status of the accused. In dealing with an application for bail it is also relevant that the court should consider what are the penal consequences of the act when proved, and what is the nature of the offence charged, and whether the offence charged is or is not a bailable offence. However, it is obvious from a perusal of s 389 of the Criminal Procedure Code that a judge has jurisdiction to consider an application under the said section and we agreed with Encik Shafee that the words 'in any case' import that the powers of the High Court are unfettered. The High Court has the fullest discretion in the matter when considering the amount of the bond and the words 'whether there be an appeal on conviction or not' appearing in the said section gives the judge very wide powers to admit to bail even where an accused person has been convicted and has not appealed. Therefore, where a man convicted has not preferred an appeal, bail may be granted pending the filing of the appeal. In this case we would not agree with the learned deputy that the applicant should have filed an appeal under s 394 of the Criminal Procedure Code and that because he had applied under s 389 of the said Code, the High Court did not have jurisdiction to entertain it.

We would conclude that the High Court had jurisdiction to entertain the application under s. 389 regarding the amount of bond executed under Chapter XXXVIII of the said Code.

Wong Kim Fatt JC (as he then was) in *Manickam & Ors v. PP* [1982] 1 CLJ 162; [1982] 1 MLJ 227 had occasion to consider s. 389 of the CPC. At p. 229 of the report, his Lordship in fine language said:

The law is clear that the High Court in its absolute discretion may under sections 388 and 389 of the Criminal Procedure Code grant bail to an accused person pending trial after his application for bail has been refused by the lower courts, even if an offence with which the accused is charged is punishable with death or imprisonment for life. The judgments of Harun J. in *Sulaiman bin Kadir v. Public Prosecutor* [1976] 2 MLJ 37, 38 and Gunn Chit Tuan J. in *Che Su binti Daud v. Public Prosecutor* [1978] 2 MLJ 162 are in point.

In cases where there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life, because of the seriousness of the offence charged, no bail should be granted, unless the accused satisfies the High Court that there are exceptional and special grounds justifying the granting of bail. In such an event, the burden is on the accused. In other cases of lesser charges, bail should, in my opinion, normally

be granted as a matter of course, unless the prosecution can satisfy the court that in the interest of justice bail should not be granted. In all cases (whether bailable or not bailable) the High Court has the discretion to grant bail under sections 388 and 389 of the Criminal Procedure Code, but, as has often been said, that discretion must always be exercised judicially. The points for consideration in granting or refusing bail may be found on page 551 of *Mallal's Criminal Procedure Code* (4th Edition).

Shaik Daud J (now JCA) in *Dato' Mat Shah lwn. PP* [1991] 2 MLJ 125 had this to say of s. 389 of the CPC particularly at p. 126 of the report:

Walaubagaimanapun saya masih berpendapat Mahkamah Tinggi berkuasa untuk melayani permohonan seperti ini, iaitu untuk mengubahsuai syarat jaminan, di bawah bidang kuasanya di bawah s 389 KAJ. Mahkamah Agung dalam kes *PP v. Zulkifflee bin Hassan* [1990] 2 MLJ 215 memutuskan mengikut peruntukan s 389 KAJ, Mahkamah Tinggi mempunyai bidang kuasa mendengar permohonan di bawah s 389 mengenai jumlah bon jaminan. Berikutan dari keputusan itu saya berpendapat Mahkamah Tinggi juga mempunyai bidang kuasa untuk mendengar atau melayani permohonan bagi mengubahsuai syarat jaminan di bawah seksyen yang sama. Saya berpendapat sedemikian walupun seksyen tersebut tidak dengan terus terang menyebutkannya. Pada pendapat saya segala aspek bersangkutan dengan jaminan termasuk amaun, dan syarat-syarat baginya termasuk dalam s 389. Walaupun perkataan 'syarat' tidak disebut dalam seksyen ini, namun Mahkamah Tinggi mempunyai bidangkuasa 'inherent' atas perkara-perkara lain yang berkaitan dengan jaminan. Tidak ada sebarang peruntukan lain dalam KAJ yang memberi kuasa mutlak bagi permohonan pengubahsuain syarat jaminan. Oleh itu saya berpendapat apa sahaja perintah mahkamah sesyen atau majisteret yang bersangkutan dengan jaminan termasuk syarat jaminan boleh didengar di bawah s 389 oleh Mahkamah Tinggi. Malah apabila kita teliti Bab XXXVII KAJ tidak ada langsung peruntukan yang membenarkan mana-mana mahkamah mengenakan sebarang syarat semasa membenarkan jaminan. Dari itu dapat kita simpulkan syarat yang dikenakan itu tersirat dalam peruntukan s 389 KAJ, di bawah mana jaminan dibenarkan. Pada pendapat saya bidang kuasa untuk mengubahsuaikan syarat jaminan begitu juga tesirat dalam s 389 KAJ dan dengan menggunakan kuasa sedia ada (inherent powers), Mahkamah Tinggi boleh melayani permohonan ini. Pada pendapat saya sekiranya mahkamah mempunyai bidang kuasa untuk mengenakan syarat walaupun tidak ada peruntukan semasa membenarkan jaminan, mustahil Mahkamah Tinggi tidak mempunyai kuasa untuk mengubahsuaikan syarat tersebut atas sebab-sebab yang tertentu.

Oleh yang demikian pada pendapat saya Mahkamah Tinggi mempunyai bidang kuasa di bawah s 389 KAJ untuk mengubahsuaikan mana-mana syarat yang dikenakan semasa jaminan dibenarkan oleh mahkamah sesyen atau mahkamah majistret.

It is undeniable that the High Court is empowered to exercise the powers vested in it under s. 389 of the CPC but the facts of the present case especially

that part about what the magistrate had said in open court separates and distinguishes it from the other authorities referred to earlier. An appeal is the only option open to the applicant in the peculiar circumstances of the present case and it is the correct procedure for the applicant to adopt. This meant that the notice of motion in encl. 2 should be struck out forthwith. Datin Amelia Tee Hong Geok bte Abdullah succeeds in her preliminary objection.

Appeal

In regard to the appeal which is now open to the applicant, NH Chan JCA remarked in *Dato' Seri Anwar bin Ibrahim v. PP* [1999] 1 CLJ 537; [1999] 1 MLJ 321, especially at p. 329:

> There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision which gives a right to appeal. The creation of a right of appeal is an act which requires legislative authority. The right to appeal from one court to another must be conferred by some statute, otherwise, the decision of every court of law is final.

Section 307(i) of the CPC enacts as follows:

> Except in any case to which section 304 … applies [and subject to the provisions of sections 305 and 306] any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging, within ten days from the time of such judgment, sentence or order being passed or made, with the clerk of such Magistrate's Court a notice of appeal in triplicate addressed to the High Court and by paying at the same time the prescribed appeal fee.

and the party appealing must be dissatisfied with any "judgment, sentence or order" before proceeding to file an appeal. In *PP v. Hoo Chang Chwen* [1962] 28 MLJ 284, the court there held that in a case where there was a contest as to the procedural ruling made by the magistrate, neither the prosecution nor the defence can appeal when that procedural ruling was made in the middle of the trial because such a ruling was said to be a ruling that was not an appealable order within the provisions of the CPC. In the present case before me, the magistrate refused an application for bail and that refusal was an order of the court within the meaning of s. 307(i) of the CPC. The present case can certainly be distinguished from *PP v. Hoo Chang Chwen (supra)* and to prove my point, I need only cite a passage of Rose CJ who delivered the judgment in that case. This was what Rose CJ said at p. 284 of the report:

> I would add that to arrive at any other conclusion would seem to me to open the door to a number of appeals in the course of criminal trials on points which

> are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial court.

In *PP v. RK Menon & Anor* [1978] 2 MLJ 152, a similar situation arose. There the defence had raised an objection pertaining to the improper initiation of proceeding and this was overruled by the trial court. On appeal, it was held that this was a mere procedural ruling and was therefore unappealable.

In *Datuk Mahinder Singh v. PP* [1987] 2 CLJ 39, there was no written sanction of the public prosecutor in prosecuting the appellant and this point was held to be unappealable.

In *Marzuki Mokhtar v. PP* [1981] 2 MLJ 155, the learned magistrate made a ruling at the end of the prosecution case to the effect that there was a case for the accused to answer on the charge against him and an appeal was lodged in regard to that ruling. The High Court ruled that the appeal had been brought prematurely and it was not competent for the court to deal with such an appeal.

In *Maleb Su v. PP, Cheak Yoke Thong v. PP* [1984] 1 MLJ 311, the court was faced with the question of whether the appeals relate to judgment, sentence or order. The court applied the *ejusdem generis* rule to the word "order" and held that the order must be "a final order in the sense that it is final in effect as in the case of a judgment or a sentence."

How to determine finality of the order? In my considered view, the only way to ascertain this question is to see whether the judgment or order finally disposes off the rights of the parties. Here, when the magistrate made an order refusing bail to the applicant, the issue of bail settled the applicant's right to liberty and that being the case it was an order within the ambit and purport of s. 307(i) of the CPC and thus appealable to the High Court. This was my judgment and I so hold accordingly.

Bail

To release an accused person from custody is to grant bail to him. Bail ensures freedom to an accused person so that he would be able to conduct his business pending trial. The CPC do not define the meaning of the word "bail". When bail is granted, the accused person will be put in the custody of his sureties. In *Yusof Mohamed v. PP* [1995] 3 MLJ 66, I did say at p. 69 of the report:

> Bail in simple language, means security taken from a person to appear on a fixed date before a court. The meaning of the word 'bail' as ordinarily and commonly understood is to set free a person who is under arrest, detention or is under some kind of restraint by taking security for his appearance. It is well and good that an accused person be put on bail pending the hearing of his

> appeal. But under our CPC, bail is not to be granted automatically in almost every case. Society has to be protected from the hazards of the misadventures of one who has been alleged to have committed a crime. The Public Prosecutor approaches the criminal courts with a prayer to detain the criminal in an attempt to allay the fears of society. As against this reasonable request of the Public Prosecutor as the guardian of society, there is the accepted principle of criminal jurisprudence that a man is presumed to be innocent until he is found to be guilty. It is, I think, in an attempt to resolve this conflict of principles that the law of bails has emerged. I must say that it is not a static law but is forever growing – moulding itself with the exigencies of time and place.

Section 387 of the CPC enacts as follows:

> (i) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail by any police officer in charge of a police station or by any police officer not under the rank of Corporal or by such Court.
>
> (ii) Such police officer or such Court, if he or it thinks fit, may instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

and, in summary, it says that any person who is entitled to bail is a person who is:

(a) accused of a non-bailable offence; and

(b) arrested or detained without warrant by a police officer; or

(c) appears or is brought before a court; and

(d) is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail.

To further understand the subject of bail, one must take note that offences are classified into two segments: bailable and non-bailable. Section 2 (i) of the CPC defines "bailable offence" as:

> an offence shown as bailable in the First Schedule to this Code or which is made bailable by any other law for the time being in force and 'non-bailable offence' means any other offence.

In short, a non-bailable offence means any other offence other than a bailable offence. The cases of *R v. Lim Kwang Seng & Ors* [1956] MLJ 178; *Sebastian v. PP* [1968] 2 MLJ 214; *Bakshi Sardari Lal v. Supt, Tehar Central Jail* [1968] Cr LJ 675; and *Ratilall Bhanji Mithani v. Assistant Collector of Customs* AIR

[1967] SC 1939 laid down a singular principle of law: once an accused is charged with a bailable offence, he is entitled to be released on bail as of right – as a matter of course.

The expression "appears or is brought before a court" in s. 387(i) of the CPC makes for interesting reading. The word "appears" is often used in the context of a summons case whereas the expression "is brought before a court" is used in the context of warrant of arrest (*Bhramar v. State of Orissa* [1981] Cri LJ 1057; and *State v. Dallu Punja* [1954] Cri LJ 1052). The word "appears" connotes personal appearance and not appearance through counsel (*State of Uttar Pradesh v. Kailash* AIR [1955] UP 97). It was held in *PP v. Manikya Rao* AIR [1959] Andra Pradesh 639 at p. 641 that the words "is brought before a court" involve the idea that the "accused is produced before a court" and by the word "appear" it shows that the accused has surrendered himself in obedience to a process of court.

The granting or refusal of bail under s. 388(i) of the CPC is entirely a discretionary domain of the court. Several factors may influence the court in granting bail and these factors may be summarised as follows:

(1) the magnitude of the offence charged;

(2) the evidence garnered in support of the charge;

(3) the quantum of punishment upon conviction;

(4) the danger that the accused will not abscond;

(5) the danger that the accused may obstruct the prosecution by interfering with the material witnesses;

(6) the likelihood that the offence will be repeated;

(7) the danger that the accused is likely to fabricate false evidence in support of his defence;

(8) the danger that the accused will incite riot, violence, and disturb the peace and tranquillity of the country;

(9) the sufficient opportunity of the accused to prepare his defence and mobilise his case;

(10) the standing, character, integrity and the financial means of the accused; and

(11) public policy together with public interest to be considered.

In *Lim Kiap Khee v. PP* [1988] 1 MLJ 198, Zakaria Yatim J (now FCJ) had to consider the question of bail. There the applicant was charged in the Sessions Court with two charges of criminal breach of trust under s. 409 of the Penal Code. Bail in the sum of RM300,000 was set and his passports were ordered to be impounded. He subsequently applied to the High Court for the release of his international passport. The High Court had to consider whether it was empowered to impose conditions when granting bail and whether the Sessions Court judge was right in ordering the international passport of the accused impounded in addition to the granting of bail. At p. 200 of the report, his Lordship Zakaria Yatim J (now FCJ) said:

> It is clear from the authorities cited above, in non-bailable offences, the court has the absolute discretion under section 388 whether to allow bail or to refuse bail except in cases punishable with death or imprisonment for life. In granting bail, the court may, in addition to stating the amount of bail and the number of sureties, impose an additional condition requiring the accused person to surrender his passport. If he complies with these conditions, then he is released on bail. If he fails to comply with any of these conditions, then he is kept in remand until his trial. When the court lays down the conditions for bail, it is left to the accused whether to comply with the conditions or not. The choice is entirely his. If he does not want to surrender his passport, then he opts to remain in custody.

Other conditions may also be imposed when granting bail. The court in *PP v. Abdul Rahim Haji Ahmad & Ors* [1988] 3 MLJ 272 imposed two conditions before granting bail. Firstly, the applicants were required to report twice a day to the nearest police station and, secondly, they were prohibited from approaching the premises where the complainant lived.

For the moment, the issue of bail will be left in abeyance. The fate of the applicant in so far as his bail was concerned, will be decided in the near future.

Conclusion

For the reasons adumbrated above, I allowed the preliminary objection as advanced by the learned deputy public prosecutor. The notice of motion in encl. 2 must be struck off. The only option left for the applicant would be to advance his cause by way of an appeal.